SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

Nos. 280, 314 and 966

ROSCO JONES,

Petitioner,

vs.

CITY OF OPELIKA;

LOIS BOWDEN AND ZADA SANDERS,

Petitioners,

vs.

CITY OF FORT SMITH, ARKANSAS;

CHARLES JOBIN,

Appellant,

vs.

STATE OF ARIZONA.

BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
Amicus Curiae,
By ELISHA HANSON,
Counsel for Amicus Curiae.

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This brief is submitted by the American Newspaper Publishers Association as Amicus Curiae in the above entitled causes in support of the petitioners' joint motion for rehearing.[1]

[1] For convenience the moving parties herein are collectively referred to as petitioners.

Statement of the Case.

In the interest of brevity the Amicus Curiae accepts the statements of the cases as set forth in the briefs of petitioners before this Court by writs of certiorari in Nos. 280 and 314 and by appeal in No. 966. It also relies upon the statements of fact in the dissenting opinions of Mr. Chief Justice Stone and Justices Black, Douglas and Murphy rendered in these cases on June 8, 1942.

Interest of the Amicus Curiae.

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Membership in the Association is confined to publishers of daily and/or Sunday newspapers. This membership embraces more than 425 newspaper publishers whose publications represent in excess of 80% of the total daily and Sunday circulation of newspapers published in the United States.

The Amicus Curiae files this brief because it believes that the majority opinion in the cases herein establishes a dangerous precedent for licensing the press by legislative devices which resurrect the evils the First Amendment was intended forever to remove.

Among the functions of the daily newspaper press is the gathering and dissemination of information in the form of news, editorial comment and advertising.

News is factual information concerning matters of public importance that in the judgment of the editor is of sufficient general interest to warrant its publication.

Editorial comment is discussion of such matters from the analytical or critical viewpoint. It includes expression of opinion.

Advertising is information concerning the goods, services or ideas of one who is willing to pay to have that information disseminated through the press.

The Amicus Curiae submits that the judgments of conviction affirmed by this Court violate the rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Constitutional Provisions Involved.

The First Amendment to the Constitution of the United States is as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The pertinent portion of the Fourteenth Amendment to the Constitution of the United States is as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Argument.

The First and Fourteenth Amendments Deny to the Legislature the Power to License the Publication or Circulation of Information or Ideas Through the Press or Other Media.

The issue in this proceeding is whether under our Constitution the legislature has the power to require a license as a condition precedent to the exercise of the rights guaranteed by the First Amendment and protected by the Fourteenth Amendment against invasion by the states.

No such power exists. If it does exist, then the historic struggle which culminated in the adoption of the First Amendment—indeed, in the entire Bill of Rights—was all in vain.

Nothing has been made plainer in prior decisions of this Court than that the First Amendment resulted from a long history of resistance of the press to the twin evils of censorship through licensing of the press and the notorious "taxes on knowledge" in the form of stamp taxes on the circulation and taxes on advertising matter of newspapers.

This Court has recorded that history in numerous decisions, notably in *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936) and *Bridges* v. *California, Times-Mirror Co.* v. *Superior Court*, 62 Sup. Ct. 190 (1941). From that historical background has emerged the fundamental interpretation that the First Amendment is a grant of immunity from every conceivable form of abridgment of a free press, whether it be a previous restraint upon publication or a restraint upon circulation subsequent to publication. And to remove any doubt concerning the extent of this protection this Court recently declared that

> "the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." (*Bridges* v. *California, Times-Mirror Co.* v. *Superior Court*, *supra* at page 195.)

Neither logical distinctions nor professed needs for revenue can change the *character* of the license taxes in the present cases as conditions precedent to the exercise of the right to distribute printed information. Whether the tax be called a license tax, a privilege tax, an occupation tax, a business tax or a fee, any tax or other exaction which falls directly upon the act of circulation is an unconstitutional restraint upon the liberty of the press. It is the old stamp tax in another and more evil guise. Merely

characterizing the tax as a tax for revenue only will not change its nature and effect.

The issue in this proceeding becomes confused unless a careful distinction is made between ordinary taxes and license taxes. When a tax must be paid to secure a license for doing certain acts the acts done are illegal unless the license is obtained. This can only mean that a license tax creates a condition precedent to the right to engage in a given activity. And if the statute further provides for revocation of the license in certain circumstances it also means that there may be a condition subsequent which prevents continuance of the given activity.

No agency of the government can impose such conditions upon the exercise of the rights conferred by the First Amendment.

It is immaterial whether the license issues as a matter of course or whether its issuance or revocation is at the uncontrollable discretion of an administrative official. The requirement of a license is in itself a clog upon the press.

The question involved is the *existence* of such power and not its reasonable exercise. Whether the license tax professes to be for revenue purposes or for regulatory purposes the First Amendment removes from the sphere of taxable subject matter any tax which constitutes a restraint upon the acts of publication or circulation—in short, upon any of the functions of the press. There is no power to compel a publisher to choose between taking a license or refraining from the activity of publication or dissemination.

The license taxes sustained in these cases operate as conditions precedent which must be met before the act of circulation can be exercised at all. Hence the license taxes regulate one important function of the press. And if such regulation is valid all the functions of the press can be thus regulated.

Merely to state this consequence is to demonstrate that neither the states nor Congress has the power so to regulate the press.

The hazards to which the press may be exposed as a result of the upholding of the license taxes in the instant cases are readily perceived. If the legislature can require a license as a condition precedent to the circulation of press information it can impose an identical license as a condition to engaging in the newspaper publishing business. It can then impose heavy fines and penalties for non-payment of the license fee and enjoin publication or distribution until the fee is paid. If the state has such power it can make the conditions of the license whatsoever it wills, to the extent, for instance, that only a few newspapers can perform the functions of the press, or even to such an extent that none can perform those functions at all.

Once it is decided that a license tax can be laid upon the right to publish or to disseminate printed matter then there is no limit to this power short of complete control or suppression of the press. Prior decisions of this Court have repeatedly pointed out that when the subject matter is brought within the taxing power of a state or municipality the legislature may then fix the rate of the tax and thereby control or destroy the activity taxed. *Magnano Co.* v. *Hamilton*, 292 U. S. 40 (1934); *Grosjean* v. *American Press Co., supra.* Where the power to regulate exists there may be no limit to its exercise within the discretion of the state. For if the power exists at all the oppressiveness of the burden upon those burdened cannot interdict the regulation. *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550 (1935).

The mere enumeration of these hazards conclusively shows that the First Amendment prohibits regulation of the press by any sort of restraint, whether it be by licensing, taxation or otherwise.

History records that the Constitution originally did not contain a Bill of Rights and that there was a controversy between the Federalists, who advocated ratification of the Constitution as it then stood, and the Republicans, who demanded a Bill of Rights as a condition to the ratification of the Constitution. One fact that stands out above all others is that both sides in the controversy were convinced that freedom of the press should not be infringed through governmental regulation of any sort, kind or description. The controversy was over the method of protecting the principle and not over the principle itself. See Ford, Pamphlets on the Constitution of the United States, 1787-1788, pp. 113, 156-157, 316 (1888); Pennsylvania and the Federal Constitution (McMaster and Stone, Eds.), pp. 180, 181, 576 ff. (1888); Stevens, Sources of the Constitution of the United States, pp. 213, 218, 221 (1894).

So the Founding Fathers determined that the public good required that the press shall not be subject to regulation or control by any agency of government. The First Amendment places freedom of the press in a preferred position, as Mr. Chief Justice Stone has pointed out. 62 Sup. Ct. at page 1244. The press is not an ordinary private business that is subject to licensing or control. It is not like a public utility that can be required to take out a license or obtain a certificate of convenience and necessity or procure a charter with special limitations before it can operate.

The very fact of licensing to engage or continue in the business of publishing or circulating newspapers destroys the independence of the press. When regulation enters the door, independence flies out the window. From that moment practically every activity of the press may be regulated.

If the state has the power to license or regulate the press then it can determine who might or might not engage or continue in the newspaper publishing business and limit the extent of their activities therein; where and when a

newspaper might circulate; how many copies it might distribute; what it should or should not publish; who might or might not advertise in it; what it should charge for its publications; what it should charge its advertisers for the services rendered therein. Under a power to license or regulate the press the legislature can also claim the power to classify the press for regulatory purposes on the basis of such factors as the volume of circulation, frequency of issue and area of distribution. If there is power to impose license taxes as a price for carrying on the operations of the press then there is nothing to prevent the legislature from declaring that the business of publishing newspapers is a business to be licensed. And if it can so declare it can also license the preacher of the gospel and can limit those who can preach to the destruction of freedom of religion as guaranteed by the First Amendment.

All such invasions of the liberty of the press are plainly prohibited by the unequivocal and broad commands of the First Amendment.

The subtle encroachments upon the freedom of the press to which the majority opinion in the present case lends support make it imperative that misconceptions attributable to a dictum of this Court in *Associated Press* v. *NLRB*, 301 U. S. 103, 132 (1937) [2] be cleared away.

This Amicus Curiae has previously conceded before this Court,[3] and repeats here, that newspapers are not immune from certain general laws. For example, the press is answerable for abuses to which the general law of libel applies.

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[2] "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and non-discriminatory taxes on his business."

[3] Brief of the American Newspaper Publishers Association as Amicus Curiae, *Times-Mirror Co.* v. *Superior Court*, No. 64, United States Supreme Court, October Term, 1940.

Similarly, newspapers are not immune from the ordinary forms of taxation. Newspapers pay a large number of different taxes, among which are federal and state income taxes, federal capital stock taxes, federal social security taxes, corporate franchise taxes, real and personal property taxes and unemployment compensation taxes. But none of these taxes, as distinguished from the license taxes in the present cases, has a prohibitory or censorial quality or operates as a condition precedent to the publication or circulation of newspapers.

The Amicus Curiae subscribes fully to the proposition of Mr. Chief Justice Stone that the commands of the First and Fourteenth Amendments as applied to the press extend at least to every form of taxation which, because it is a condition of the exercise of the right of publication and circulation, is capable of being used to suppress or control such activities. 62 Sup. Ct. at page 1244.

License taxes on the operations of the press fall within the proscribed category. Such taxes are not ordinary forms of taxation which merely take money out of the pockets of the publisher, as in the case of taxes heretofore mentioned. License taxes have a prohibitory or censorial quality either on their face or in the potentialities of their administration.

Because license taxes condition the exercise of the right to publish and to disseminate the publication their validity does not depend upon the small size or amount of the tax. Whether for revenue or for regulatory purposes the small price for a license of today may become the entering wedge for the large price of a license tomorrow once it is held that what is taxed is within the power of the state. The character and effect and not the amount of the tax is the decisive factor. In the light of the long history of misuse of license taxes as weapons of censorship and suppression of ideas any tax upon publication or circulation of printed informa-

tion invades the constitutional guaranty. What the Founding Fathers feared above all was any form of tax which created a restraint either by reason of a prohibitory or censorial tendency prior to publication or as a deterrent to distribution of the publication. Even taxes on circulation for purely revenue purposes were deemed obnoxious to a free press. 62 Sup. Ct. at page 1248.

Misconceptions have also arisen concerning the scope of the holding in *Grosjean* v. *American Press Co., supra.* In that case the State of Louisiana placed a tax upon the advertising revenue of newspapers and magazines with a circulation in excess of 20,000 copies a week. This Court was unanimous in holding that such a tax was an unconstitutional restraint upon the press in a double sense. First, its effect was to curtail the amount of revenue realized from advertising, thereby affecting the service of the press, and, second, its direct tendency was to restrict circulation.

The rationale of the *Grosjean* case was not rested upon the fact that a selected group of newspapers was singled out for attack by the notorious Huey Long administration then in power in the state. The *Grosjean* case condemns every form of restraint upon the circulation of newspapers in recognition of the fact that liberty of circulation is the very life blood of the press and that every newspaper depends upon advertising revenue to meet the major part of its cost of production. Decreased revenue resulting from taxes on newspaper advertising therefore seriously impairs the operations of the press.

The fact that the tax in the *Grosjean* case was one with a long history of hostile misuse against the freedom of the press simply made the purpose to suppress circulation very plain. But, as Mr. Chief Justice Stone pointed out in the present cases, the First Amendment is not confined to safeguarding the freedoms therein against discriminatory action of the state or to cases where the protected privilege is

sought-out for attack. Any tax which fetters the press is unconstitutional, as Mr. Justice Sutherland's review of the history of the First Amendment in the *Grosjean* case conclusively demonstrates.

The Amicus Curiae submits that this Court should reconsider and clarify the effect of its decision in *Giragi* v. *Moore*, 301 U. S. 670 (1937). In that case the State of Arizona levied a tax of one per cent upon the gross receipts of various businesses in the state, including the newspaper publishing business, and required every person engaged in a business subject to such tax to obtain a license or else suffer fines and penalties.

An examination of the record in the *Giragi* case will show that the contention that the tax there involved was in violation of the Fourteenth Amendment was first raised on motion for rehearing before the Supreme Court of Arizona. Until that motion for rehearing no federal question had been raised. Consequently, when the record came before this Court on appeal, it was deficient in failing adequately to show in what respects the tax constituted a restraint upon the press.

This Court therefore dismissed the appeal in a per curiam decision for want of a substantial federal question. *Giragi* v. *Moore, supra.* But the matter was disposed of on a jurisdictional statement only and the per curiam decision was not accompanied by an opinion explaining the relation of *Grosjean* v. *American Press Co., supra* and *Associated Press* v. *NLRB, supra* to the issue involved. The Amicus Curiae therefore believes that the true character and effect of a tax such as that in the *Giragi* case has never been fully considered by this Court.

Nor was the true character and effect of the tax fully considered in *Arizona Publishing Co.* v. *O'Neil*, 304 U. S. 543 (1938), where this Court on appeal affirmed the judgment of the District Court of the United States for the District

of Arizona upholding the same tax statute as in the *Giragi* case. This case was also decided on the jurisdictional statement and in a per curiam decision which needs clarification.

Since the *Giragi* and *Arizona Publishing Company* decisions this Court has made it plain in *Lovell* v. *Griffin*, 303 U. S. 444 (1938), that the First Amendment safeguards liberty of circulation as well as liberty of publication. The Amicus Curiae believes that in the light of the *Lovell* and subsequent cases the statute in the Arizona cases was as clear a violation of the freedom of the press as are the ordinances in the present cases. All of them are license taxes which have the common vice of a condition precedent to the exercise of the right to publish or to distribute.

The question of whether a state may enact regulations for police protection relating to the safety, morals or good order of the community may be laid aside. That is not in issue herein. Even if that question were involved, this Court, as on other occasions, would carefully scrutinize the professed purpose of police protection to see whether in reality it is a purpose to restrain the publication or distribution of information and opinion. In the present cases, even if a regulatory purpose were claimed, the license taxes would still fall directly upon the dissemination of ideas and hence would be repugnant to the First Amendment.

Detractors of a free press sometimes argue that the publishers of newspapers and magazines are not guaranteed special privileges by the First Amendment. Publishers have never claimed special privileges for themselves. As Mr. Chief Justice Stone has said, the First and Fourteenth Amendments place the freedoms of religion, press and speech "in a preferred position". In the case of the press its functions, as described in the beginning of this brief, fulfill a historic objective of the discovery and diffusion of knowledge. Freedom of the press is the right of the people to have information of vital public importance free from

censorship, restraint or control of those in authority. So when publishers are constantly on guard to challenge any impairment of a free press they are not seeking special privileges for themselves or for any class of persons. Rather they are discharging their solemn responsibility as trustees of the right of all the people to open channels of inquiry and discussion on matters of public importance.

If immunity from licensing of the press by taxation is labelled "special privilege" then the very immunity granted by the First Amendment is assailed.

Conclusion.

It is respectfully submitted that the joint motion for rehearing herein be granted and that on the rehearing the judgments of conviction be reversed.

Respectfully submitted,

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
Amicus Curiae,
By ELISHA HANSON,
Counsel for Amicus Curiae.